683

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOME LAND AND CATTLE COMPANY, (a corporation), and THE NATIONAL BANK OF COMMERCE, (a corporation),

Appellants,

vs.

CORNELIUS J. McNAMARA AND THOMAS A. MARLOW, COPARTNERS UNDER THE FIRM NAME AND STYLE OF McNAMARA & MARLOW,

Appellees.

BRIEF OF APPELLEES.

H. G. McINTIRE,
S. H. McINTIRE,
Solicitors for Appellees.

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HOME LAND AND CATTLE COMPANY, (a corporation), and THE NATIONAL BANK OF COMMERCE, (a corporation),

Appellants,

vs.

CORNELIUS J. McNAMARA AND THOMAS A. MARLOW, COPARTNERS UNDER THE FIRM NAME AND STYLE OF McNAMARA & MARLOW,

Appellees.

BRIEF OF APPELLEES.

This cause, after issue joined, was referred on November 26, 1898 by consent of the respective parties, the order of reference reading:

"It is hereby ordered that all and singular the issues in the said cause be and the same are hereby referred to Henry N. Blake master of this court, to hear the testimony and proof of the respective parties as to such issues, and report the same to this court, together with his conclusions of fact and law thereon, according to the rules and practice of this court in such case made and provided." (Record page 28).

In pursuance thereof the master heard voluminous testimony and proof (Record pages 62-614) and made his

findings of fact and conclusions of law thereon. (Record pages 29-37) which were filed and entered in the cause on September 14, 1899 (Record page 37). To these findings and conclusions, the defendants on October 11, 1899 filed certain exceptions (Record pages 38-42) and the plaintiffs on October 13, 1899 filed also certain exceptions and requests for additional findings of fact upon the evidence adduced before the master (Record pages 42-46). No further or additional testimony than that reported by the master was offered or introduced in the cause. The cause thereupon came on for hearing, was argued and submitted to the court. The court on December 10, 1900 filed a written opinion, concluding with the statement, "With this view of the law and the facts presented in this case I have reached the conclusion that sufficient equities are presented to entitle complainants to the relief prayed for in their bill", confirmed the master's report and ordered a decree in favor of complainants (Record pages 50-60). A final decree was thereupon entered in favor of plaintiffs (Record pages 47-49) from which the present appeal is taken, appellants specifying twenty assignments of error. Those numbered I to VII (Record pages 616-617) are directed to the court's overruling of the said exceptions, save that numbered I, (Record page 39), as to which no error is assigned, that defendants had filed to the master's report; and those numbered IX to XIV inclusive (Record pages 618 to 620) are directed to certain assumed holdings or findings of the court; those numbered XV to XVII inclusive (Record pages 620 to 622) are directed to the court's adopt-

ing or confirming the master's finding No. 11 and the conclusions of law Nos. 1 and 2 drawn by him; and those numbered XVIII to XX (Record pages 622-623) are directed against the court's decreeing specific performance of the contract, sued on, in favor of plaintiffs.

ARGUMENT.

We shall endeavor to follow the same order pursued by appellants in their brief.

I.

This is directed against the court's action in refusing to consider the exceptions filed by defendants to the master's report. This action was based on the fact that no objections or exceptions had been presented to the master but had in the first instance been presented to the court. Kimberly vs. Arms 129 U. S. 512, 524 and other Federal authorities were cited by the court in support of this ruling (Record page 52). There can be no serious contention against this ruling. In Tate vs. Holmes 76 Fed. 664, 667 this court by Judge Gilbert said:

"The testimony does not leave these conclusions doubtful in our minds, but, if it did, we would not be disposed to disturb the findings of the circuit court. It is the rule of practice of the supreme court and of the circuit courts of appeal that, where the trial court has considered conflicting evidence, and has made its findings thereon, the findings must be presumed to be correct, and will not be disturbed in the appellate court unless an obvious error has been made in the consideration of the

evidence. Tilghman vs. Proctor 125 U. S. 136, 8 Sup. Ct., 894; Kimberly vs. Arms, 129 U. S. 512, 9. Sup. Ct. 355; Bank vs. Rogers. 3 C. C. A. 666, 53 Fed. 776; Warren vs. Burt, 7 C. C. A. 105, 58 Fed. 101."

And in United States Trust Company vs. Mercantile Trust Company, 88 Fed. 152-153 it , through Judge Morrow, said:

"It will be observed that the reference, by the court below, to the special master, of the claim for taxes made by the intervener, the Southern Pacific Railroad Company, was not that of an ordinary reference to take and report testimony, but it was stipulated and agreed between counsel representing all the parties that the special master should take the proofs of the respective parties, and report the same to the court with his findings of fact and conclusions of law thereon. The effect of this stipulation was undoubtedly to constitute to a certain extent, the special master as the judge of the facts presented to him. The scope and effect of such a stipulation is tersely stated by Mr. Justice Brown, delivering the opinion of the United States Supreme court in Davis vs. Schwartz 155 U. S. 631, 636, 15 Sup. Ct. 237, 239 in the following language:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his findings so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the

court under Rev. Stat. Sec. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding it must be treated as unassailable, citing Wiscart vs. D'Auchy 3 Dall. 321; Bond vs. Brown 12 How. 254; Graham vs. Bayne, 18 How. 60, 62; Norris vs. Jackson 9 Wall. 125; Insurance Co. vs. Folsom 18 Wall. 237, 249; The Abbotsford 98 U. S. 440.

See further, Kimberly vs. Arms, 129 U. S. 512,9 Sup. Ct. 355; Crawford vs. Neal 144 U. S. 585, 596, 12 Sup. Ct. 759; Furrer vs. Ferris 145 U. S. 132, 12 Sup. Ct. 821. So far therefore, as the findings of fact by the special master, under the stipulation referred to, are based upon conflicting evidence, or upon the veracity of witnesses, or so far as there is evidence consistent with the finding, they are conclusive and binding upon the court."

By reference to the exhaustive note to Kimberly vs. Arms 129 U. S. 512 contained in Volume 11 pp. 713-714 in Rose's Notes on the U. S. Reports it will be seen that the same ruling has been followed by other Federal courts.

To which may be added

Schwartz vs. Duss 103 Fed. 565

North American Exploration Co. vs. Adams 104 Fed. 407, 408.

Fidelity &c. Co. vs. St. Matthews Sav. Bank 104 Fed. 860.

W. U. Tel. Co. vs. American Bell Tel. Co. 105 Fed. 686.

With such an array of authorities as this it is not necessary to refer to appellants' citations of decisions which were made prior to the authoritative ruling of the Supreme Court in Kimberly vs. Arms.

Further the said exceptions of defendants are radically defective in that they are too loose and general. This subject was also discussed in Sheffield &c R. Co. vs. Gordon 151 U. S. 290 where the court refuses to consider exceptions obnoxious to that objection, saying, after quoting with approval Dexter vs. Arnold 2 Sumn. 125:

"The same rule was laid down in Story vs. Livingston 13 Pet. 359, 366 wherein the exceptions to the report of a master were held to be too general, indicating nothing but dissatisfaction with the entire report; and furnishing no specific grounds, as they should have done ,wherein the defendant had suffered any wrong, or as to which of his rights had been disregarded. The court observed that 'exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to.' The court cited with approval the case of Wilkes vs. Rogers 6 Johns. 566, wherein it was said that exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken to be admitted. So in Greene vs. Bishop 1 Cliff. 186, 191, Mr. Justice Clifford held that 'general allegations of error, without pointing to any particulars, are clearly insufficient, for

the reason that, if allowable, the losing party might always compel the court to hear the case anew, and should that practice prevail, references such as made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party.' See also Stanton vs. Alabama &c. Railroad, 2 Woods 506, 518."

See also Cutting vs. Florida &c R. Co. 48 Fed. 506, cited *supra*, in which it was held, also, that the exceptions were too vague and indefinite to authorize the court to go behind the report. The exceptions here referred to will be found in the first report of the same case in 43 Fed. 746, 747.

With the law so firmly establishing this matter of practice, we think we could rest here, but our position is fortified by the fact that the lower court considered the merits of the case, after extensive argument, and decided that plaintiffs were entitled to a decree.

II.

Appellants' second contention seems to be based, as their brief pp. 30-31 shows, on the proposition that the circuit court erred in considering that the contract sued on herein was not "a severable contract and that the appellants had no right to demand payment for the cattle delivered on October 21st where they had not the ability to comply fully with the terms of the contract, requiring the delivery of 9000 head of steers and heifers,"

and they say that assignment of error numbered 9, 10, 11, and 14 were designed to present this ruling for review. By far the larger portion of their brief, pages 30 to 68, is devoted to this assertion, several subdivisions being made of the same and much is therein contained that we fail to see the applicability of to the present case. But as in this argument not only the contract, with appellees' rights thereunder, the findings of the master, the testimony generally, and the deductions of law to be drawn therefrom are discussed, perhaps we cannot do better than to present our contention and then consider that of appellants. The contract (Record pp. 12-17) is not a complicated one. It provides generally for the sale to appellees by appellant, the Home Land and Cattle Company, of all of a herd of cattle belonging to appellant company estimated to contain some 30000 head more or less; the cattle were to be gathered by said appellant and counted out to appellees *during the regular round-up season of* 1897 in train load lots but none were to be delivered or accepted after November 1st, 1897; no deliveries were to be made in less than such train load lots, and the steers, spayed heifers and dry cows were to be delivered at the same points *when marketable for beef, in the opinion of appellees*; the purchase price was fixed at $25 per head, *payable upon delivery of said cattle*; the party of the first part to said contract, the Home Land and Cattle Company, guaranteed therein to deliver *during the round up season* of 1897 not less than 9000 head of beef cattle (steers of three years old and up and spayed heifers of four years old and up) as a part of this herd and

in the event it failed so to do it agreed to pay $20 in cash for each head less than 9000 of such cattle; *at the end of such round-up season* it was also agreed there should be delivered and purchased 500 head of horses at $20 per head.

Under this contract deliveries commenced on July 11, 1897, were continued from time to time until October 22nd, such deliveries amounting to some 16,000 head. On October 18th appellants notified appellees that they would make a further delivery on October 21st of 820 steers, 631 stock cattle and 500 head of horses. The Home Land and Cattle Company finished its round-up for the season of 1897 upon October 22nd, and had not made any preparations for and did not intend to make any further deliveries under said contract on or before November 1st of that year (Finding 12, Record p. 33). This then being the final delivery for 1897 it became apparent to appellees that there would be a shortage in the beef cattle to the extent of 1895 head. They had received 7018 head of appellants and the report of 87 head of beef steers from the Board of Stock Commissioners payments for which latter however were not made by the Board until the end of the season (See testimony of Marlow, Record pp. 341, 362). On October 21st and 22nd appellants delivered of the animals then on hand the 820 steers and 113 stock cattle (Finding 11, Record p. 32) but refused to deliver the balance then on hand, 457 head of stock cattle and the 500 head of horses unless appellees gave a draft for the 933 which had been delivered. This appellees declined to do, but offered to pay

for said cattle and horses upon their delivery provided that appellants would pay or allow for such shortage of beef cattle at the agreed price of $20 per head; and they tendered the sum of $9,675 being the contract price for said 933 head of cattle which had been delivered and the 457 head of cattle and 500 horses still on hand, giving further credit for the 113 strays reported by the Board of Stock Commissioners, less such shortage of 1895 head of beef cattle at $20 per head, to-wit, $37,900; this appellants refused to accept and refused to deliver the 457 head of cattle and the 500 horses. Was this action on the part of appellees in accordance with law? It will be seen from the foregoing that the time in which appellants had agreed to deliver the 9000 head of beef cattle had expired. This was during the round-up season of 1897 (Contract Clause 9th, Record p. 15. See also clause 4th, Record p. 14) which appellants themselves had fixed as terminating with this delivery of October 21st and 22nd.

"They had not made any preparations for and did not intend to make any further deliveries under said contract Exhibit A on or before the 1st day of November 1897." (Finding 12, Record p. 33)

If we understand the position of appellants' counsel correctly, they claim that "the defendants had not contracted to adjust damages under the ninth clause of the contract until November 1st, 1897 and they could not be called upon so to do upon the 22nd day of October 1897." (Brief p. 36). This however is a misconception of the terms of the contract, one which it does not justify

and one which appellants themselves did not take at the time, for clause 10th of the contract (Record p. 15) provides for a delivery of the 500 horses at the *"end of the round-up season of* 1897," and such horses were prepared to be delivered, and in a way, were then offered by appellants to appellees. We cannot find any ambiguity as to this in the contract, but if there were one we understand the rule to be that the court will follow the construction placed on the contract by the parties themselves.

Leavitt vs. Windsor Land &c. Co (8th C. C. A.) 54 Fed. 439.

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract."

District of Columbia vs. Gallaher 124 U. S. 505, 510

and in

Topliff vs. Topliff 122 U. S. 131 it is said:

"If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period. 'In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the

difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one.' Chicago vs. Sheldon 9 Wall. 50 54 per Mr. Justice Nelson."

See also 1 Beach Modern Law of Contracts sec. 721 and notes.

This sum of $37,900 was consequently then due from appellants to appellees. Should appellees have paid for the cattle and horses on hand at this final delivery of October 21-22 and then turned around and sued for the amount due them from appellants? We think not. It is a maxim that "The law never does nor requires idle acts." Robertson vs, Davenport 27 Ala., 574 is directly in point. There plaintiffs had contracted to deliver to defendant a certain quantity of hams at a stipulated price to be delivered during the season as defendant might want them and to be paid for on delivery. After a delivery of a part plaintiffs became unable to comply with the contract and defendant having refused to pay for those delivered plaintiffs brought suit for the price. It was held that if defendant knew the plaintiffs were unable to complete their contract he might refuse to pay and might recoup his damages. The instruction, which was there held erroneously refused, was to the effect that if plaintiffs, when the money for the bill sued on was demanded, had

ceased to have the ability to comply with their contract and defendant knew that fact, he might refuse to pay for the hams sued for and might recoup his damage.

See also Freeth vs. Burr, L. R. C. P. 208 and other cases cited in West vs. Bechtel (Mich.) 84 N. W. Rep. 71.

But aside from these citations it would seem impossible to add anything to the views expressed by the learned judge who tried this case. See Record pp. 58-59.

Now did the defendants, appellants, under the circumstances of this case have the right to refuse to deliver the balance of the stock on hand because of the alleged failure of plaintiffs, appellees, to pay for the 933 animals which had been delivered on October 21-22nd? It must be borne in mind that the delivery of the animals which defendants notified plaintiffs would be turned over on October 21st was not to consist of several distinct deliveries but only of one. This appears from the master's finding No. 10 (Record p. 32). It is borne out further by the fact that in all previous deliveries, even though the actual turning over of the animals consumed several days and consisted of distinct acts, the payment for the same was not made until after the receipt of all the animals (See testimony of Marlow, Record pages 393 394, 404 418, 420, 421, 422; and testimony of McNamara, Record pages 432, 435, 436, 485, 487, 488). We have then a case where a party in the midst of a delivery refuses to complete it unless his demand of payment for those already delivered is at once complied with and this in the light of a contract which provides for payment upon delivery in train load

lots. Doubtless the contract is an entire one.

"The fact that there were subordinate stipulations in regard to the dates of delivery and of payment would not break it up into separate contracts for each installment. It is sufficient to cite on this point the cases of Iron Co. vs. Naylor 9 App. Cas. 434 in the English House of Lords and Norrington vs. Wright 115 U.S. 188, 203,204. And the contract being entire as soon as the parties had entered upon its performance by partial delivery and payment, the mere failure of the vendee to make the subsequent payments would not of itself absolve the vendor from proceeding with the deliveries. It may be that a downright refusal to make payment, or other equivalent conduct evincing a purpose to renounce the contract, would entitle the other party to treat the contract as abandoned, and relieve him from the obligation to proceed further in its execution. Winchester vs. Newton 2 Allen 492. In respect to the obligation of the vendee to accept delivery of the goods under such a contract, where the vendor fails to comply with its stipulations with regard to the time and mode of delivery it was held in Norrington vs. Wright, supra, that he was entitled to insist upon a continued adherence to its terms. This was because they were of the substance of the thing contracted for. But the duty of the vendor, notwithstanding a mere failure of the vendee to make payment of money, not evincing a renunciation of the contract, stands upon a different ground, as pointed out in that opinion and results also, from a comparison of the actual decision in that case with other cases distinctly

involving the vendor's duty in those circumstances, among them the case of Iron Co. vs. Naylor, which it recognizes as authoritative."

Cherry Val. Iron Works vs. Florence I. R. Co. (6th C. C. A.) 64 Fed. 572.

It hardly seems necessary to add authorities sustaining the above but they are abundant. In Otis vs. Adams 56 N. J. L. 38, s. c. 27 Atl. Rep. 1093 the court said:

"The contract set out is a continuing contract of sale. It does not expressly nor by implication make payment for each lot delivered a condition precedent to the continuing obligation to sell and deliver. In such contracts default by one party will not release the other from his continuing obligation unless the conduct of the defaulting party evinces an intention on his part to abandon the contract, and no longer be bound thereby. Blackburn vs. Reilly, 47 N. J. L. 290, 1 Atl. 27; Trotter vs. Heckscher 40 N. J. Eq., 612,4 Atl. 83."

In Gerli vs. Poidebard Silk Mfg. Co., 57 N. J. L. 435, s. c. 31 Atl., 402 the court said:

"The other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the non-delivery of the first installment of silk. The general rule on this subject was thus laid down by this court in Blackburn vs. Reilly, 47 N. J. L.290, 54 Am. Rep., 159: 'In contracts for sale of goods to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarly discharge the other party from his obligation unless the conduct

of the party in default be such as to evince an intention to abandon the contract or design no longer to be bound by its terms.' In the case cited this rule was enforced against the buyer. In Trotter vs. Heckscher 40 N. J. Eq. 612 this court, and in Otis vs. Adams, 56 N. J. L. 38 the supreme court enforced it against the seller. That the conduct of the vendors in the present case did not evince an intention to abandon the contract, or not to be bound by its terms, appears beyond dispute."

In this latter case the brief of counsel so clearly states the principle that we avail ourselves of it. It is as follows:

"The vendee was not discharged from the obligation to take later installments because of the nondelivery of the first, unless the vendor had shown an intention to abandon the contract. The contract belongs to a class sometimes called "installment" or "continuing" contracts. Withers vs. Reynolds, 2 Barn. & Ad. 882; State vs. Davis 53 N. J. L. 144; Spicer vs. Cooper 1 Q. B. 424. In this class of cases the fundamental question is, whether the failure of one party to deliver or to pay for one installment discharges the other from his duty to accept or pay for later installments. Any breach may give the injured party a cause of action for damages, but every breach does not justify rescission. It is clear that one party cannot be considered as discharged from his duty to perform without the express or implied consent of the other. And if such consent is implied from a breach, it must be by reason of the fact that the performance in question was conditioned upon the performance

of that term of the contract which has been broken. A breach which in itself may be regarded as an invitation to an abandonment of the contract or a consent to the discharge of the other party from his obligations under it, must be one going to the essence of the contract, and not merely to some part of it, so that it may appear that the performance insisted upon was conditioned upon the performance which has failed. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. Pordage vs. Cole 1 Wm. Saund. 319.

"The inquiry is: Is the value to the injured party of the residue of the contract, if performed, dependant upon the performance of the part which has been broken? If not, clearly such performance of the residue, plus damages for the particular breach, gives the injured party the equivalent of full performance. A failure to make one delivery or one payment is not a breach which goes to the essence of the contract, and, consequently, is not such a breach as may be considered an invitation to the injured party to abandon the entire engagement or to treat himself as discharged from all its obligations. Damages are a sufficient compensation. Blackburn vs. Reilly 47 N. J. L. 290, 54 Am. Dec. 159; Simpson vs. Crippin L. R. 8 Q. B. 17; Johnasson vs. Young 4 Best & S. 300; Brandt vs. Pawrence L. R. I. Q. B. Div. 344; Freeth

vs. Burr L. R. 9 C. P. 208; Mersey Steel & I. Co. vs. Naylor L R 9 Q B. Div. 648. L. R. 9 App. Cas. 434; Benjamin Sales, Bennett's Ed. 1892 Sec. 593a p. 547.

"By the deliberate adoption in Blackburn vs. Reilly, supra, of the doctrine thus established by the English courts, this court did for New Jersey what they had done for England, and the principle applicable to this class of cases is no longer open to debate.

Trotter vs. Heckscher, 40 N. J. Eq. 646,42 N. J. Eq. 258; Lehigh Zinc & I Co. vs. Trotter 43 N. J. Eq. 193; Otis vs. Adams 56 N. J. L. 38; See also Lucesco Oil Co. vs. Brewer 66 Pa. 351; Morgan vs. McKee, 77 Pa. 228; Scott vs. Kittanning Coal Co., 89 Pa. 231, 33 Am. Rep. 753; Winchester vs. Newton 2 Allen 492; Note of Mr. Landreth 21 Am. L. Reg. N. S. 398."

In Bogardus vs. N. Y. Life Ins. Co. 101 N. Y. 335, s. c. 4 N. E. 523-524 it is said:

"The failure of one party to a contract to perform some of its obligations, when it consists of a number of independent provisions, furnishes no excuse for non-performance to the other party. It is only when the non-performance is of a condition precedent, or where such party has wholly refused to perform, or has wholly disabled himself from completing a substantial performance, that the other party is relieved from performance, or a tender thereof. People vs. Empire Mut. Life Ins. Co., 92 N. Y. 109; Shaw vs. Republic Life Ins. Co.,69 N. Y. 293."

And see 1 Beach Modern Law Contracts sec. 123 where it is said:

"The leading case in point is the Mersey Steel Co. vs. Naylor, decided by the House of Lords, to the effect that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it; and this case was, as to the point actually decided, cited with approval by the United States Supreme Court in Norrington vs. Wright;" See also section 849.

A case that presents several of the features found in the case at bar is Myer vs. Wheeler 65 Iowa 390, s. c. 21 N. W. Rep. 692. There plaintiffs contracted to sell and deliver to defendants 10 car loads of barley which plaintiffs had the right to deliver in lots of one or more cars at a time and draw on defendants for the amount of each separate delivery at the time it was made; one car was shipped and a draft drawn for the same; when the car arrived defendants found that it did not correspond to the sample and they refused to pay the draft, writing to plaintiffs to that effect and that they had given them credit for the car load at the reduced price of five cents per bushel. A few days after defendants further informed plaintiffs that they would pay the drafts drawn for future deliveries, but that they intended to retain the amount due on the car load received until all the barley should be delivered. Plaintiffs refused to assent to this, urged payment for the carload delivered and informed defendants they would deliver no more until tris was done, but expressed a willingness to deliver the

balance if this amount was paid. In the meantime there had been an advance in the value of barley and no further deliveries were made. The trial court found among its conclusions of law that the failure to pay for the car load delivered was not a rescission of the contract and did not entitle plaintiffs to rescind it. Judgment was entered for plaintiffs for the car load delivered but a reduction was made because of the inferior quality of the barley and defendants were awarded damages for the non-delivery of the nine car loads not delivered. The court in affirming the judgment said: "We are of the opinion, however, that the contract was not rescinded by the refusal of defendants to pay the amount due at the time when by its terms they ought to have paid it, and that plaintiffs were not thereby released from a performance of the unperformed portions of the contract. The contract was severable. When plaintiffs delivered the carload in question on the tracks the contract was thereby so far performed as that the rights and obligations of the parties with reference to that car load were fully established under it. They had then performed one of a series of acts which they undertook to perform and they were entitled under the contract to compensation for that act. They thereby performed a specific portion of their undertaking, and were entitled, by virtue of the contract, to a definite and certain portion of the consideration, and were in a position to enforce the payment by defendants of that portion of it, and their right in that respect was not at all dependent on the performance either by themselves or defendants of the other con-

ditions of the contract. Defendants were not in default as to the unexecuted portions of the contract. Nor did it appear that they ever would be in default as to them. They expressed a willingness to pay for the other nine carloads as they should be delivered, and there is no claim that they were not able to perform their undertaking in that regard. They did not refuse absolutely to pay for the carload which was delivered, but claimed the right to retain the price until the others should be delivered, and as security for the performance of the contract by plaintiffs. It was not understood when the parties entered into the contract that plaintiffs were dependent for the means to purchase the subsequent carloads on the money which they would obtain for those first delivered. Nor is it shown that they were so dependent. We think, therefore, that the circuit court rightly held that plaintiffs were liable for the damages occasioned by their failure to deliver the remaining carloads. The rule established by the decided weight of authority, both in England and this country, is that recission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the whole consideration. Freeth vs. Burr, L. R. 9 C. P. 208; Mersey Steel & Iron Works vs. Naylor, L. R. 9 Q. B. Div. 648; Simpson vs. Crippin, L. R. 8 Q. B. 14; Newton vs. Winchester, 16 Gray 208; Winchester vs. Newton 2 Allen 492; Sawyer vs. Railway Company 22 Wis., 403; Burge vs. Cedar Rapids & M. R. R. Co., 32 Iowa, 101; Hayden vs. Reynolds, 54 Iowa, 157; S. C. 6 N. W. Rep. 180. See also the collection of authorities on the subject in the

note of Mr. Lucius S. Landreth to the case of Norrington vs. Wright, 21 Amer. Law Reg. 395."

The latest case that we have seen on the subject is that of West vs. Bechtel (Mich.) 84 N. W. Rep. 69, decided November 13, 1900. The facts in that case also present many of the features of this one. It was a case for the sale of a lot of wood, deliverable in carloads, payment to be made on delivery. Three cars were shipped and two paid for, defendant thereupon refused to deliver any more. There was nothing evincing an intention on plaintiff's part not to perform the contract and they demanded delivery of the remainder. The action was brought to recover damages because of defendant's refusal to deliver. Held, that plaintiff's mere refusal to pay for the third carload until more was delivered was not such a breach of the contract as would warrant defendant in repudiating the entire contract, and, he was therefore liable for the non-performance. This case contains an exhaustive review of the cases English and American and in our opinion leaves but little more to say on that subject.

In the light of the law as laid down by the authorities it must be concluded that the mere failure to pay for the animals delivered on October 21st and 22nd, even if appellants were then entitled to demand the same, did not amount to a breach of the contract on the part of McNamara and Marlow nor did it absolve the appellants from the duty to continue the deliveries as they had contracted to do. Appellants, then, and not appellees are the parties that broke the contract,

and their refusal to go ahead with it was wrongful. Findings Nos. 11, 21, 22, 23 and conclusions of law Nos. 1 and 2 are consequently true and proper.

Was there any evidence of an intent on thepart of appellees to be no longer bound by the contract? There is not a word showing any such intent, but much to show the contrary, (Finding No. 14, Record p. 34) and if more were needed, then, the fact of the bringing of this suit to enforce the contract, practically simultaneously, with the breach on the part of appellants shows conclusively that the appellees intended it to remain in force.

We have carefully read the article referred to in appellants' brief, from 14 Harvard Law Review, 317 and find nothing in it militating against the views heretofore expressed but much in support of them, for taking as a point of departure the statement that "whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial" and which is repeated on page 440 of that article as follows, "A distinction between ability and willful intention not to perform is not of practical value." and the correctness of theis statement appellants seem to concede in their brief, then Prof. Williston's deductions on pages 427 and 434 of that article, to-wit: "If it is clear that one party to a contract is going to be unable to perform it the other party should be excused from performing. The excuse is the same as in cases where a willfull intention not to perform is manifested. The party aggrieved is not going to get what he bargained for in return for his performance. It is immaterial to

him, and it should be immaterial to the court whether the reason is because the other party cannot or because he will not do what he promised. Even if the prospective inability is due to *ris major* this should be true." "Every consideration of justice requires that repudiation or inability to perform should immediately excuse the innocent party from performing, nor is any technical rule violated if the excuse is allowed. But it does not follow from this that he has an immediate right of action. It is a consequence of allowing such an excuse that when he brings an action he shall not be defeated by reason of the fact that he himself has not performed, since that failure to perform was excused by the defendant's fault" become peculiarly applicable to the fact of this case, for even though appellees were in duty bound to pay for the cattle received still this performance was excused as soon as the inability on the appellants' part to deliver the full 9,000 head of steers became an ascertained fact. This was not at some period anterior to the final delivery of October 21st and 22nd as assumed by counsel in their brief, but upon October 22nd as the master explicitly finds (Finding No. 13, Record p. 34); and as the delivery of the 9000 head was to have been made "during the season of 1897" (Contract clause 9th, Record p. 15) a valid claim to the stipulated amount for the shortage then arose, and by the terms of the clause in question became then immediately payable and consequently this action should "not be defeated by reason of the fact that he himslf has not prformed,since that failure to perform was excused by the defendant's fault." With

this view of the case section 1936 of the Civil Code of Montana:

"If a party to an obligation gives notice to another before the latter is in default that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former" seems to coincide. In this case we have the equivalent of notice from appellants that they would not perform the obligation on their part in an important particular, this before it is even claimed appellees had failed to do anything, such performance was due on October 22nd, consequently we are entitled to enforce the obligation without performing or offering to perform any condition on our part in favor of appellants. But upon this strict right, appellees never insisted, all they asked for was the fair and equitable adjustment of the two claims, that in favor of themselves and that in favor of appellants. Whether the inability to deliver the full 9000 head of beef steers arose out of the non-existence of that number is not material. The parties as they might lawfully do provided for that contingency by the clause in question and as the Supreme Court of the United States in Chicago &c. Ry. Co. vs. Hoyt, 149 U. S. 14 says:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be

put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act of the promiser."

And section 2324 of the Civil Code of Montana provides:

"Any property which, if in existence, might be the subject of sale may be the subject of an agreement of sale, whether in existence or not."

It was clearly within the contemplation of the parties to this contract that it might be impossible for the Cattle Company to deliver the stipulated number of beef cattle, it therefore agreed to deliver such number as it could, and for all less than the stipulated number to do something else, to-wit: to pay $20 per head. It is immaterial whether the entire number of 9000 head were in existence or not. Under no view of clause 9 can it be said that it was impossible to comply with its terms.

We now take up the brief of the appellants. In the light of the authorities cited in the first part of this brief it is idle to discuss whether the delivery of October 21st and 22nd was a final one for that year. That is one of the issued raised by the pleadings. All the witnesses for the appellees testified to that effect, and though the testimony of appellants conflict therewith, the masters findings in that regard is conclusive.

There was no election on the part of appellees to waive the beef shortage. They were never called on to do so. The mere fact of surmise or anticipation on their part that there would be such a shortage coupled with the re-

ceipt of subsequent deliveries would not amount to such an election.

Appellees have never rescinded the contract nor sought so to do. Nor could they have done so because of a shortage. Clause 9th of the contract gave them no such remedy. That provides for a payment of $20 for each beef animal less than the stipulated number of 9000 head. In this it is so entirely different from the contract involved in McGillin vs. Bennett 132 U. S. 445 as to excite surprise that that case should be cited as applicable to the present one. Nor does said clause contain any penalty. It is nothing more than a guaranty on the part of the Home Land and Cattle company that the number of cattle in the herd sold to appellees should amount to 9000, and an agreement on its part to pay $20 per head for any less number, and the exaction of a bond to that effect or the insertion in the contract of a clause that they might retain enough to guard against any possible shortage would have added nothing to the legal effect of the clause as it now stands.

Much of the brief of appellants is based on a supposed repudiation by appellees of the contract. This is so beyond the facts as not to deserve more than a passing remark. Appellees have neither rescinded, abrogated nor broken the contract (See Findings Nos. 11, 21, 22 and 23 and conclusions of law Nos. 1 and 2). We fail to see then, the applicability of the authorities cited on pages 43 to 50 inclusive of appellants' brief, to the facts of this case. We think we have sufficiently shown that appellants

were in default, and that the master correctly so found, we consequently pass this subdivision of the brief.

In the light of the fact, as shown by the testimony, that appellants after their wrongful refusal to deliver them, had run the horses out of the jurisdiction of the state court, it is passing strange for counsel to assert that they "held these cattle in the hope that appellees would retract their decision and go on with the contract." The observations on pages 53 to 58 of said brief are but a repetition in an amplified form of the assertion that appellants performed their obligation but appellees failed to perform theirs. It is not true that appellants could make deliveries as they saw fit, for the contract provides for deliveries in train load lots, this is defined as being in the neighborhood of 500 head, as low as 476 and as high as 639 head, according to the cattle (Testimony of Marlow, Record p. 363.

Appellants have cited quite a number of authorities in support of their contention that the mere fact of a failure on the part of a purchaser to make a payment on such a contract as this one entitles the vendor to rescind the contract on his part. Do they bear it out? Stephenson vs. Cady 117 Mass. 6 is certainly not in point, for from appellants' own quotation from that case (Brief p. 60.) the failure to pay was construed as "*something more than a refusal to pay for a single delivery. It was broad enough to be treated as a general refusal to make any further payments.*" And so in King vs. Faist 161 Mass., 449, s. c. 37 N. E. Rep. 456, the rescission there was held justified not for the

failure to pay, but because the purchaser insisted on a condition not contemplated in the contract and refused to make further payments unless it was complied with. That that court is against appellants' contention is apparent from the language of the decision cited: "It is true that they stated also in the same letter, 'you returned our draft unpaid which cancels all other contracts, *a statement which considered as a proposition of law was, no doubt, erroneous.*"

In Hayes vs. City of Nashville, 80 Fed., 641 the contract contained a provision that if the vendee failed "to take and pay for any installment of bonds as above provided, when delivered then at the option of the City of Nashville this contract may be declared null and void in all its provisions." That the court did not intend any such conclusion as appellants claim is apparent on page 647 where Cherry Valley Iron Works vs. Florence Iron River Co., 64 Fed., 569 is cited with approval. This case, then, is not in point.

In Wharton vs. Winch 104 N. Y. 287, s. c. 35 N. E. Rep. 589 the contract was for railroad work. The court said:

"In view of the structure of this contract, it would seem to be clear that the mere failure of the defendant to make punctual payment of an installment due according to its provisions was not such a breach of the entire contract as to permit the plaintiff to refuse to proceed further under it, and recover damages for the profits which he would have earned had the contract been

fully performed on his part. In the able and elaborate brief submitted by the learned counsel for the appellant, our attention has not been called to any case where the contrary of this proposition has been maintained. While the question does not seem to have been the subject of frequent discussion in this state authority is not wanting to support this view. In Moore vs. Taylor 42 Hun. 45 the plaintiff sought to recover prospective profits upon the failure to pay an installment under a contract for railroad construction similar in its important features to the one before us; and it was held by the general term of the Fifth Department, Judge Bradley delivering the opinion of the court, that mere default in the payment of an installment when it becomes due is not such a denial of the right of contract, or to continue in the performance of the service, as in legal effect to constitute a breach of the entire contract. Such a failure of itself is not equivalent to a refusal on the part of the defendant to be further bound by the contract, or to an abandonment of its provisions by him. This rule was clearly recognized by this court in Nichols vs. Steel Co., 137 N. Y. 471, 33 N. E. Rep. 561, where it was held that under a contract to deliver iron in specified portions monthly, the delivery for each month to be paid for on the 27th of the following month, the refusal to be further bound by the terms of the contract or to accept further deliveries and to give notes already demandable, and to give any more notes at any time or for any purpose in the future, or to pay moneys at any time which were eventually to be paid under the contract—that all these things

constituted a breach of the contract as a whole, and gave a present right of action to recover damages sustained thereby."

Raabe vs. Squire 148 N. Y., 81, s. c. 42 N. E. Rep. 516, was an action to establish a lien for work and labor. It has no bearing whatever, as the slightest examination of it will show.

Keeler vs. Clifford (Ill.) 42 N. E. Rep. 248 was an action brought by the contractor for an amount due on a grading or levelling contract. There is nothing in it that is applicable to the facts of this case.

DeLoach vs. Smith (Ga.) 10 S. E. Rep., 436 was a suit by the vendor against the purchaser, the contract and the court's views of the law applicable to the facts appear from the following:

"The third ground of the motion, which was relied upon here for reversal of the judgment of the court below, is in substance, that the court erred in charging that if after the plaintiffs had delivered 13,000 feet of lumber, the defendants refused to pay for the amount thus delivered, and failed to furnish any other specifications for lumber to be sawed, such non-performance by the defendants of their part of the contract was a breach thereof, and the plaintiff could recover. We see no error in this charge. It seems to us to be a sound proposition of law. If the defendants made a contract with the plaintiffs and agreed to take 100,000 feet of lumber, and to give specifications for sawing the same, and the plaintiffs furnished a part of it, and the defendant refused to pay therefor

when it was due, and to furnish additional specifications, it was a breach of the contract and the plaintiffs would be entitled to recover whatever damages they may have sustained by reason of such breach." This case then, is not in point.

Armstrong vs. St. Paul &c. Co., (Minn.) 49 N. W. 233 and 50 N. W. 1029, was a case "where the purchaser notifies the seller that he will not pay the contract price for the property, if delivered, but only a less price, it amounts to a repudiation of the contract, and absolves the seller from the duty of delivering the property; and he may have his action for the loss of profits on the sale." On the re-hearing the decision was adhered to. That this case does not support appellants' contention appears from the following:

"It is doubtless true that there may be acts of default in the performance of the strict terms of a contract which would not evince any intention to repudiate its obligations, and which consequently the other party would have no right to treat as a repudiation. An example of this is Iron Co. vs. Naylor L. R. App. Cas. 434 cited and relied on by plaintiffs. But this is clearly not such a case."

Bowdish vs. Briggs 39 N. Y. S. 371 was on a contract for personal services, the employee suing the employer. The plaintiff quit work because of a controversy over what he was entitled to get under the contract. Held that defendant could not defeat recovery for the value of the work done where plaintiffs failure was caused by defendant's refusal to carry out his part of the contract.

Ferree vs. Wilson 19 N. Y. S. 209 was on a contract for advertising. Held that defendant was not entitled to a non-suit because plaintiff's evidence showed non-performance on his part, where it also appeared that defendant made the first default.

Cunningham vs. Ry. Co., 18 N. Y. S. 600 was upon a contract for railroad work; held that where defendant had failed to meet the payments provided for in the contract plaintiff was justified in abandoning the work. In none of them was the doctrine of Mersey S. & I. Co. vs. Naylor *supra* and the authorities heretofore cited discussed. Nor was it in Robson vs. Bohn 27 Minn., 333. Nor in Evans vs. C. & R. I. R. Co., 26 Ill., 189. We fail to find the case of Miller vs. Sullivan (Tex.) 35 S. W. 695; there is a case under that title on page 362 but the only point there considered was that of who are proper parties defendant.

Wherein section 1955 of the Montana Civil Code has any bearing on this question we fail to see.

As we have seen from the foregoing authorties the doctrine of Mersey S. & I. Co. vs. Naylor, *supra*, has met with the acceptance and approval of all the American courts, where it came under review, and so far as the English courts are concerned we have but to call attention to 2 Benjamin on Sales (Kerr's Am. Ed.) section 793 where that case is considered after a review of the English cases which preceded it, and where the learned author says: "It is submitted that this decision must be taken to settle the law upon this subject."

We submit that this branch of appellants' brief

(pp. 30-68) has been shown to be not in accordance with the facts of the case nor with the law.

III.

Appellants' brief, third subdivision asserts that "respondents never tendered performance" and it is said that it is based upon the assignments of error numbered XV. and XVI. It was not incumbent on appellees to make any tender of payment at all. Payment under the contract was not to precede delivery but to follow it. As we have seen it was the duty of appellants to make deliveries in accordance with the contract, and failing so to do and in insisting upon payment before delivery, as the findings and testimony show they did (Record pp. 595, 598) was an unwarrantable demand upon their part with which appellees were in nowise bound to comply. The offer that was made by appellees on October 22nd was far more than the law required of them, and the six reasons advanced in appellants' brief (pp. 69-70) in criticism of it are wholly untenable. Only one of them, that numbered 4, need be here noted. It is not true that the exact number of strays shipped to market was not then known. Finding 11 designates it as 113 which is justified by the testimony of Marlow (Record pp. 341, 362) to the effect that they had then received 113 strays of which 87 were beef cattle. Since October 21st enough further strays were received to make the total number 148 head (Record p. 362.). This is uncontradicted, and it is from it that the master made his finding No. 8.

Appellants next attack clause 9th of the contract claim-

ing that it is an attempt to fix the amount of damages for a breach of the contract in anticipation thereof and within the purview of sections 2243 and 2244 of the Montana Civil Code. This strikes us as a total misconception of the clause in question. The contract price of all animals delivered was $25 per head, to say then, that the $20 per head which clause 9th provides to be paid for the shortage in the number of beef cattle which the Home Land and Cattle Company guaranteed its herd contained, is at least far fetched. We can hardly credit counsel as being serious, if they contend, that in the event of a breach of this contract by appellants appellees would be limited in their recovery to a value of $20 only for any and all animals agreed to be delivered. And yet if this is not their contention we fail to understand them. But aside from this let us see what was intended by this clause 9. The master and the trial court have both found that it is a material part of the contract and that plaintiffs relied upon the guaranty and agreement therein contained (Record p. 37.) McNamara in his testimony (Record p. 430) says that a guaranty of 9000 head of steers in a herd of cattle would make it worth more than if the 9000 steers were not there; and that they agreed to take the cattle at the price named, $25 per head, if the Home Land and Cattle Company would guarantee having 9000 head of such cattle, or that they would take the cattle without this guarantee at $23 per head; and that this guarantee represented the difference between $25 and $23 per head. Mr. W. F. Niedringhaus, the president of

the Home Land and Cattle Company testified on this point as follows:

"Q. And further in these negotiations had at that time, did you not state to McNamara and Marlow that you had at least 12,000 head of beef cattle in this herd of yours—steers of three years old and upward and spayed heifers?

A. I did. It was our impression we had that many.

Q. And it was only after a great deal of dickering back and forth that you came to the figures of 9999 head, was it not?

A. Yes sir.

Q. Now, the fact of having a certain number of cattle, beef cattle in your herd, was one of the inducements that were held out to McNamara and Marlow to induce them to pay such a large price, wasn't it?

A. That is the way I understand it; yes, sir." (Record p. 99.)

From this it is clear that clause 9th is not a fixing of damages for any anticipated breach of the contract. The Cattle Company through its officers supposed it had 12,000 head of beef cattle, and was willing to guarantee 9,000 head in order to induce McNamara and Marlow to pay for the animals in the herd $2 more than they were worth at the time the contract was made, if such number of beef steers was not in it. For it, then, to come in now and say that this material inducement held out by it, is void, would in the language of Lord Macauley "shock the moral sensibilities of a den of robbers." No

such contention can be entertained in a court of justice. Appellants are estopped from asserting it.

2 Pomeroy's Eq. Juris. secs. 802, 805.

What the clause itself means is too plain for extended argument. It was clearly within the contemplation of the parties to the contract that it might be impossible for the Home Land and Cattle Company to deliver the stipulated number of beef cattle, the Cattle Company consequently agreed to deliver as many of them as it could and for such number as should fall short of the stipulaed 9,000 head to do something else, i.e. to pay $20 per head. Suppose the agreement had been instead of paying the specifled number of dollars to deliver something else e. g. a horse for each steer less than 9,000, would appellants contend, then, that such agreement was a penalty or a fixing of damages? We think not. In the case from California (90 Cal. 110) which appellants cite, no such rule was announced. That case simply holds that an agreement of a certain amount as liquidated damages in the event of the breach of the contract was bad under the statute. It has no application to the circumstances of this case. Here we are not suing because of any shortage of the kind of animals mentioned in said clause 9 but to compel the performance by appellants of the contract as to the 457 head of stock cattle they refused to deliver to us on October 22, 1897. But aside from these considerations it must be admitted that the agreement contained in said clause is a promise, an undertaking, that it is founded on a consideration and consequently if not fulfilled appellees should recover therefor, they

consequently had the right to offset what they were entitled to thereunder against any sum they owed appellants for the animals delivered on October 21st and 22nd for which the cash had not been paid. It has a bearing in this case solely on the proposition that appellants were wrong in demanding payment for the full amount without taking this claim into consideration, and that the refusal to go ahead with the deliveries was not warranted by this action on the part of the appellees.

This, however, has been fully gone into in the second subdivision of this brief. The discussion of the question of penalties and liquidated damages contained in appellants' brief (pp. 71-79), although interesting, has no application whatever to this case.

IV.

The fourth subdivision of appellants' brief (pp. 79 et seq.) discusses the right to a specific performance of the contract. Although it is true, as claimed, that appellants did not agree to deliver any specific number of stock cattle during the year 1897 as to those that they had actually rounded up and had ready for delivery at the designated point there was the express agreement. It is consequently an unwarrantable aspersion to say, as counsel do, that in decreeing the delivery of these stock cattle "the court is only doing so to enable the respondents to set off against the purchase price of one class of cattle the damages sustained by failure to deliver another grade." So far as we are concerned we have here the property, 457 head of stock cattle, specifically de-

scribed and in hand, which appellants had solemnly agreed to deliver to us. The horses which they also agreed to deliver at the same time and place, need not be considered because they had been driven by appellants themselves out of the jurisdiction of the state court and beyond the reach of its officers. Some of the elementary rules of the law relating to specific performance of contracts are the following:

"When the court is able to decree part of the contract, the plaintiff may take specific performance of that part and waive the rest, or he may claim damages or compensation for the part of which he cannot have specific performance."

5 Lawson's Rights & Remedies, p. 4268. sec.2606.

"Equity has jurisdiction where the exact performance of the contract in point of time or title, quantity or quality or in some other matter cannot be had, and it is sought to enforce such performance as may be had with compensation, if necessary, for deficiency in the performance."

5 Lawson's Rights & Remedies, p. 4274, sec. 2610.

"A purchaser is entitled to specific performance against the vendor so far as the latter may be able to complete the contract, with compensation for any deficiency."

5 Lawson's Rights & Remedies, p. 4276, sec. 2612.

We understand the modern equity rule to enlarge rather than restrict the jurisdiction whereby courts of equity

undertake to compel the specific performance of contracts concerning personalty.

2 Beach on Contracts Sec. 955.

Pomeroy on Spec. Perf. of Contracts (2nd Ed.) Sec. 15.

22 Am. & Eng. Ency. of Law p. 989.

And the rule is laid down by Mr. Beach, 2 Beach Modern Equity 598, as follows:

"While in general a court of equity will not take upon itself to decree specific performance where chattel property alone is concerned its jurisdiction to do so is no longer to be doubted, and no good reason exists against the exercise of the jurisdiction in any case where compensation in damages would not furnish a complete and satisfactory remedy. The rule that such contracts are not usually enforced specifically as are contracts which relate to real property does not rest upon any ground of any distinction between the two classes of property other than that arising from their character. Contracts which relate to real property can necessarily be satisfied only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If from the nature of the personal property

it cannot, a court of equity will entertain jurisdiction to enforce the contract."

See authorities cited in foot note No. 1.

And in the case of Frue vs. Houghton, 6 Colo., 319 the rule is stated as follows:

"That courts of equity have jurisdiction to decree the specific performance of agreements whether relating to real or personal property is well settled. It is true that special circumstances must exist entitling the party to an equitable remedy in order to authorize the exercise of the jurisdiction, but the authorities agree that its exercise does not depend upon any distinction between real and personal estate. The ground of the jurisdiction when assumed is that the party seeking equitable relief cannot be fully compensated by any award of damages at law; when therefore an award of damages would not put the plaintiff in a situation as beneficial as if the agreement was specifically performed, or where compensation in damages will fall short of the redress to which he is entitled, a specific performance may be decreed. The exercise of the jurisdiction depends upon the fundamental rule of equity jurisprudence that there is not a plain, adequate and complete remedy at law."

And in the case of Gottschalk vs. Stein, 69 Md., 51, s. c. 13 Atl., 625, the rule is stated as follows:

"As a general rule courts of equity, it is true, will not decree the specific performance of a contract for the sale of goods and chattels, for the reason that an action at law for a breach of the contract affords as complete a remedy for the purchaser as a delivery of the goods, inasmuch as

with the damages thus recovered at law he can purchase the same quantity of like goods. Having thus an adequate remedy at law there is no ground for the interference of a court of equity, but we take it to be well settled that where there is an agreement to buy a specific chattel for a specific purpose, and this purpose can only be answered by the delivery of the chattel itself, or where, from the nature of the subject matter of the agreement, the measure of damages must necessarily be uncertain; or where damages will not be as beneficial to the purchaser as the performance of the contract, equity will interfere and decree the specific performance of the contract, because in such cases, an action at law for a breach of the contract will not afford the purchaser a complete and adequate remedy. In the language of Lord Selborne, 'the principle which is material to be considered is that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.' (Wilson vs. Railway Co., 9 Ch. App. 279) or, in other words, where damages at law fall short of that redress to which one is fairly and justly entitled. Doloret vs. Rothschild 1 Sim. & S. 590; Burton vs. Lister, 3 Atk. 385; White vs. Schuyler 1 Abb. Pr. (N. S.) 300; Ashton vs. Corrigan, L. R. 13 Eq. 76; Robinson vs. Cathcart, 2 Cranch, C. C. 590; Cutting vs. Dana, 25 N. J. Eq. 265."

And again, note the language at the bottom of page 626 of 13 Atlantic Reporter as follows:

"Courts of equity decree the specific performance of contracts not upon any distinction between realty and

personalty, but because damages at law may not in the particular case afford a complete remedy."

And see also the language of the Supreme Court of California in McLaughlin vs. Piatti 27 Cal., 463-464:

"As a general rule, a bill in equity does not lie to enforce the specific performance of a sale of personal property. There are exceptions to the rule, * * * * * The equitable jurisdiction to enforce specific performance in this class of contracts is not based either in whole or in part upon the accident of insolvency, but upon the general principle or truth that in the excepted cases there can be no adequate compensation in damages at law, the solvency of the defendant being given. This consequence sometimes results from the fact that the thing bargained for is of unusual distinction or curiosity, or from the fact that the commodities sold or contracted for are so related to the situation orto the business arrangements of the purchaser that non-fulfillment would greatly embarrass and impede him in his plans and prospects—threatening or involving a loss of profits which a jury could not correctly estimate; or to cases where the contract is not to be presently executed, and the like. (Taylor vs. Neville cited in 3 Atk. 384; Adderly vs. Dixon, 1 Sim. and S.; 1 Stor. Eq. Jur. Sec. 718.")

And in the case of Senter vs. Davis, 38 Cal., 453 the Supreme Court of California uses the following language:

"The jurisdiction of a court of equity to decree specific performance, does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach

complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, as that by non-performance he will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any decree of certainty, equity will decree specific perfo rmance."

A valuable case on the subject under discussion is that of Equitable Gas Light Company vs. Baltimore &c., 63 Md., 285, where it is said:

"It is certainly a well recognized general principle by courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not, however, because of the nature of the property, the subject matter of the contract, but because damages at law, calculatd on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor.

2 Sto. Eq. sec. 717; Sullivan vs. Tuck, 1 Md. Ch. Dec., 63.

But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy

at law in the particular case, or the special and peculiar nature and value of the subject matter of the contract. In the 2nd Volume of Story's Equity, sections 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed with reference to all but the very recent cases. And among the cases forming exceptions to the general rule, there is one stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by installments, for which specific performance was decreed; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate remedy in damages at law; for the profits upon the contract being dependent upon future events could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of Buxton vs. Lister, 3 Atk., 385, and repeated by Judge Story, as an apt illustration; a man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, sec. 15, p. 20, states it as a well settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plain-

tiff could not be indemnified by any such amount of damages as he could recover at law."

In Manton vs. Ray (Rhode Island 1894) 29 Atl. Rep. 998, it is said:

"1. The allegation of a bill for specific performance of a sale of stock that its value is not easily ascertainable presents a case where remedy at law is inadequate.

2. It is sufficient for a bill for specific performance of a sale of stock to allege that complainant cannot obtain the stock elsewhere than of respondent, without alleging that the stock was not on the market, or that complainant has made effort to obtain other such stock."

And in Rothholz vs. Schwarz 46 N. J. Eq. 477, 19 Atl. Rep. 317:

"The jurisdiction of this court to decree specific performance of contracts for sale of chattels is as well settled as it is for those of the sale of realty, and is based upon the same grounds, namely, the inability of the courts of law to give such remedy; and so the question whether the court will, in a particular case, exercise its jurisdiction, is to be determined upon the same considerations in both cases, the most important being whether there is a full, complete and adequate remedy at law. And the reason why the jurisdiction is seldom exercised over sales of chattels is that the remedy at law, in such cases, is usually adequate and satisfactory. Cutting vs. Dana 25 N. J. Eq. 265, and cases there cited. Pom. Spec. Perf. Secs. 9-20. Wat. Spec. Perf. Secs. 16-17 * * * * * * "The only question then is, had the complainant in this case

such a complete and adequate remedy at law as that this court should decline to exercise its jurisdiction and give him expressly what he bargained for? It is proper here to remark that, when the defendant intends to ask the court not to exercise its jurisdiction for the reason that the remedy at law is sufficiently adequate, he should take the objection in his answer. Ordinarily, unless so taken, it will be deemed to have been waived. The objection to the exercise of the admitted jurisdiction of the court on the ground that there is an adequate remedy at law differs from an objection for want of jurisdiction, which may be taken at any time. Here the jurisdiction is indisputable, the only question being whether the court ought to exercise it. But, looking at the case as if the objection had been taken in time, viz., a suit to recover the balance of the unpaid purchase money, or its equivalent,—damages for not executing the securities stipulated—would not be an adequate remedy, for the reason that the defendant has no property outside of the goods sold; and during the pendency of that suit the complainant would be destitute of any control over, or lien upon, the stock of goods, and defendant might before judgment, move them beyond the jurisdiction of the court." See also Johnson v Brooks 93 Ky. 344 Express Co v. Railroad Co. 99 U.S. 200

In addition to these authorities attention should be called to the statutes of Montana concerning the specific performance of obligations. Doing this we cite section 4410 of the Montana Civil Code which reads:

"Except as otherwise provided in this article the specific performance of an obligation may be compelled.

1. When the act to be done is in the performance wholly or partly of an express trust.

2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

3. When it would be extremely difficult to ascertain the actual damage caused by the non-performance of the act to be done; or

4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages should not be considered adequate relief."

We think that the case at bar directly falls within subdivisions 2 and 3 of said section and of section 4415 which reads:

"A contract otherwise proper to be specifically enforced may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same."

Again, Civil Code, section 4416 reads:

"The following obligations cannot be specifically enforced:

1. An obligation to render personal service, or to employ another therein.

2. An agreement to marry or live with another.

3. An agreement to submit a controversy to arbitration.

4. An agreement to perform an act, which the party

has not power to perform lawfully when required so to do.

5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or

6. An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable."

Under a familiar rule of statutory construction,- *expressio unius* &c. such an obligation as the one at bar not being included in those enumerated in said section 4416 it should follow that this particular case is one that might and can be specifically enforced.

Applying these principles to the case at bar we find that the contract was one extending over the years 1897 and 1898; that the cattle mentioned in the contract were of a peculiar value to the appellees in that they were depended upon by them to furnish cattle under beef contracts to the government Indian Reservations; and in the further fact that the appellants had made food provisions to winter the cows and young stock to fill contracts and depended upon the cattle described to fill the same.

We find from the uncontradicted testimony that the animals could not have been procured from any other source. (Testimony of Marlow, Record pp. 355, 388 and of McNamara pp. 471, 473.) We find, also from the uncontradicted testimony that it would not be possible to determine or estimate in money the damages that appellees would have sustained by being deprived of the animals in question for the uses above mentioned.

(Testimony of Marlow, Record pp. 395, 412, 414, 415, and of McNamara, p. 474.)

It is difficult to imagine a case which presents so many features for the invocation of the relief of a court of equity as this one.

Again it must be remembered that the granting of a decree for specific performance is much in the sound discretion of the trial court.

5 Lawson's Rights & Remedies p. 4262, sec. 2600.

It is only because of an abuse of this discretion that the appellate court will interfere. It is patent from the opinion of the learned trial judge that he did not abuse this discretion. 105 Fed. 202.

The only grounds urged by appellants why specific performance should not be decreed are:

1st. That a court of equity has no jurisdiction to decree specific performance of a contract for the sale of chattels.

2nd. That the contract here, as they say, contains a penalty for the breach thereof;

3rd. That to secure the relief plaintiffs must show a performance on their part of the obligations thereof.

The first one, in the light of the authorities above quoted, and appellants have cited none to the contrary, is not the law; the second is untenable because the contract does not contain a clause either liquidating the damages or providing a penalty for the breach thereof. This has been fully shown in the above. It is anomalous, to say the least, for counsel for appellants, to insist

that clause 9th of the contract so far as it provides for a definite sum for the shortage there referred to is void under the Montana statute; and then to say it is good so far as specific performance of the contract is concerned; and the third is directly found by the master and the trial court upon the facts, in favor of appellees.

Consequently, even on appellants' suggestions the decree is correct.

But we submit, aside from this, that the decree of the lower court is right both on the facts and upon the law applicable to the case, and that the same should be affirmed.

All of which is respectfully submitted.

H. G. McINTIRE,
S. H. McINTIRE,
Solicitors for Appellees.